MOTION FILED
NOV 19 2003

No. 03-464

In The
Supreme Court of the United States

THE CONSOLIDATED MUNICIPALITY
OF CARSON CITY, NEVADA,

Petitioner,

v.

DAVID Q. WEBB,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF NEVADA PUBLIC AGENCY INSURANCE POOL IN SUPPORT OF THE PETITION

STEPHEN C. BALKENBUSH
Counsel of Record
THORNDAL, DELK, BALKENBUSH & EISINGER
6590 S. McCarran Blvd., Ste. B
Reno, Nevada 89509
(775) 786-2882
Counsel for Nevada Public Agency Insurance Pool

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, the Nevada Public Agency Insurance Pool, by and through its attorneys, Thorndal, Armstrong, Delk, Balkenbush & Eisinger, respectfully moves this Court for an order granting leave to file an *amicus curiae* brief in support of Petitioner Carson City in the above-entitled matter. The parties have not consented to the filing of such a brief.

INTEREST OF THE NEVADA PUBLIC AGENCY INSURANCE POOL

In this case, the Nevada Public Agency Insurance Pool (hereinafter "Pool") represents 15 Nevada counties, 12 Nevada municipalities, 6 Nevada towns and 48 public districts and agencies in the state. Many of these public entities employ district attorneys or prosecutors who act on behalf of municipalities. Many also employ deputy court clerks, recorders, treasurers, and assessors and many employ deputy sheriffs.

The Appellate Court below ruled that deputy district attorneys in Nevada have final policymaking authority such that their singular acts can create municipal liability under 42 U.S.C. § 1983 and *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986). The Court based its decision, in part, on statutory language that is identical in separate provisions regarding all of the deputy positions mentioned above. As a result, if the Court 's ruling is not reviewed, all such deputies in Nevada are, as a matter of law, imbued with the power to bind their employers by their individual discretionary decisions. The ruling, therefore, has the effect of creating potential municipal liability for many of

the members of the Pool where none apparently existed before.

Unfortunately, the parties to this action may not adequately present the arguments to protect those deputies from the lower court's ruling. The facts presented deal solely with the actions of a deputy district attorney and have no relation to the acts of a deputy clerk, recorder, sheriff, or treasurer. Carson City's liability in this case is based solely on the purported policymaking authority of its deputy district attorney. In avoiding liability in this action, Carson City does not have an urgent interest to argue for the non-liability of deputy clerks and treasurers. Accordingly, the Pool is very concerned that its interests in avoiding future municipal liability will not be adequately represented by the named parties to this action.

ISSUES ADDRESSED BY MOVANT IN BRIEF

The Pool, in its Brief in Support of Petitioner's Petition for Certiorari, will address the ramifications of the lower court's decision, particularly inasmuch as the decision would affect deputies in positions not directly addressed by the lower court, *i.e.*, clerks, recorders, treasurers, and sheriffs. In particular, the Pool will address the conflicts created by the decision with other Federal Circuit Courts as well as state statutes and decisions within the Ninth Circuit. In addition, the Pool, on behalf of its members, wishes to advance arguments regarding the policymaking authority of such employees not presented by Carson City in its principal brief. The Pool therefore requests leave of court to file the *amicus curiae* brief filed herewith.

ASSISTANCE TO BE RENDERED TO THE COURT BY MOVANT

Petitioner addresses the propriety of the Ninth Circuit's ruling with regard to deputy district attorneys as well as the conflicts created with other federal circuits with regard to whether a deputy district attorney is a policymaker for the purposes of establishing municipal liability. These arguments may not address sufficiently the full extent of the lower court's decision with regard to other types of deputies. The brief of *amicus curiae* provides this Court with a more extensive discussion of the conflicts created by the lower court's ruling with regard to those other deputies.

CONCLUSION

For the above stated reasons, the Nevada Public Agency Insurance Pool respectfully urges the Court to grant this motion for leave to file the accompanying *amicus* brief in the present case in support of the Petition of Petitioner.

Dated: November 19, 2003.

THORNDAL, ARMSTRONG, DELK,
BALKENBUSH & EISINGER
STEPHEN C. BALKENBUSH, ESQ.
6590 South McCarran Blvd,
Ste. B
Reno, Nevada 89509
(775) 786-2882
Attorneys for Amicus Curiae
The Nevada Public Agency
Insurance Pool

TABLE OF CONTENTS

Page

Table of Authorities ii

Brief of *Amicus Curiae* in Support of Petition 1

Interests of *Amicus Curiae* 1

Introduction 2

Summary of Argument 2

Argument 3

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES

Anthony v. City of New York, 339 F.3d 129 (2d Cir. 2003) 8

Bach v. County of Butte, 147 Cal.App.3d 554, 195 Cal.Rptr. 268 (1983) 9, 10

Brady v. Fort Bend County, 145 F.3d 691 (5th Cir. 1998) 8

Brown v. Neumann, 188 F.3d 1289 (11th Cir. 1999) 7

City of Phoenix v. Yarnell, 909 P.2d 377 (Az. 1995) 8

General Motors Corp. v. City of Linden, 653 A.2d 568 (N.J. App. Div. 1995) 6

Pembaur v. City of Cinncinnati, 475 U.S. 469 (1986) 1

Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989) 6

Taylor v. Monfils, 165 F.3d 511 (7th Cir. 1998) 8

Webb v. Sloan, 330 F.3d 1158 (9th Cir. 2003) 5

STATUTES, REGULATIONS, AND RULES

Ariz. Rev. Stat. § 38-462 8

Cal. Gov. Code, Title 3, § 24000 9

Fla. Stat. § 30.07 ..... 7, 8

Nevada Revised Statutes (NRS) 246.030 4

NRS 247.040 1

NRS 247.060 3

NRS 247.100 3

NRS 248.040 5

TABLE OF AUTHORITIES – Continued

Page

NRS 250.060 .....3, 4, 5

NRS 252.070 3

NRS 277.055 .....1, 2

NRS 361.260 7

NJSA 54:4-23 6

42 U.S.C. § 1983.....1, 4, 7, 9, 10

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION

INTERESTS OF *AMICUS CURIAE*[1]

This brief of *amicus curiae* in support of the petition is submitted pursuant to Rule 37 of the Rules of this Court. A motion for leave to file this Brief is attached hereto.

Amicus, the Nevada Public Agency Insurance Pool (hereinafter "Pool"), is a public entity formed pursuant to Nevada Revised Statute (NRS) 277.055 to provide for joint purchase of insurance or for self-insurance of the members' property and casualty risks. The Pool represents 15 Nevada counties, 12 Nevada municipalities, 6 Nevada towns and 48 other public districts and agencies in the state.

Many of these public entities employ district attorneys or prosecutors who act on behalf of municipalities. Many also employ deputy court clerks, recorders, treasurers, and assessors and many employ deputy sheriffs. These employees are often required to exercise discretion in carrying out their daily duties. If the court's decision below is allowed to stand, all such deputies in Nevada may, as a matter of law, be found to have final policymaking authority such that their singular acts can create municipal liability under 42 U.S.C. § 1983 and *Pembaur v. City of Cinncinnati*, 475 U.S. 469, 479-80 (1986).

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

The ruling of the court below has the potential effect of creating municipal liability for many of the members of the Pool where none existed before.

The Pool is a public entity created pursuant to NRS 277.055 and acts on behalf of its members, through the direction of the Board of Directors and its Executive Director. Filing of an *amicus* brief has been authorized by the Board of Directors and the Executive Director.

INTRODUCTION

Amicus supports Petitioner's argument that the decision of the court of appeals creates a circuit conflict, as well as conflict among the States within the Ninth Circuit itself. *Amicus* submits this brief to make the Court aware of the importance of the decision below and its potential to do significant damage in a wide range of situations.

SUMMARY OF ARGUMENT

The court of appeals for the Ninth Circuit created a circuit conflict when it held that deputy district attorneys in Nevada are policymakers for the purpose of establishing municipal liability. Not only does this decision have ramifications for all future prosecutorial decisions made by Nevada deputy district attorneys, but the Ninth Circuit has effectively held that the acts of deputy clerks, treasurers, assessors and recorders in the State of Nevada can likewise provide the basis of municipal liability. Such a holding conflicts with other federal circuit courts as well as with decisions of state courts within the Ninth Circuit.

ARGUMENT

The statute on which the appellate court based its decision states that deputy district attorneys may transact business "to the same extent as their principals." NRS 252.070(1). The court concluded that this language indicates that if district attorneys are final policymakers, so too are deputy district attorneys, and municipal liability may be based on their actions. The position of the *amicus*, however, is that if the appellate court's decision is allowed to stand, it will have far reaching effects in the State of Nevada and other Ninth Circuit States regarding deputies of other local public officials.

A. Impact in Nevada

A review of other Nevada statutes pertaining to public offices demonstrates the impact of the appeals court's ruling. For instance, NRS 247.040(1) provides as follows: "All county recorders are authorized to appoint deputies, who are authorized to transact all official business appertaining to the office, to the same extent as their principals. A deputy must be at least 18 years of age." Chapter 247 of the Nevada Revised Statutes further provides the specific duties of the county recorder. Specifically, NRS 247.060 provides that "[a] county recorder is empowered to take and certify the acknowledgment and proof of all conveyances affecting real property, or of any other written instrument, for which he shall receive the same fees as are prescribed by law."

A number of other provisions of Chapter 247 further describe the precise manner in which a county recorder is to properly record documents. For instance, NRS 247.100 provides that "[e]ach county recorder shall: (1) Record each

document in the order in which it is received; (2) Maintain a record of all transactions conducted within the office and a record of all fees collected; and (3) Make the records maintained pursuant to subsection 2 available for public inspection during regular business hours."

As the language with respect to the appointment of county recorders is identical to that pertaining to the appointment of deputy district attorneys, under the holding of the appellate court, county recorders would also be considered policymakers for purposes of establishing municipal liability under 42 U.S.C. § 1983. And, since a deputy's authority is coextensive with the recorder, the deputy county recorder would also be considered a policymaker. Thus, if a deputy county recorder were to record a document improperly, a municipality could, according to the decision below, conceivably be liable for the deputy's actions.

Similarly, NRS 246.030, pertaining to county clerks, provides as follows: "All county clerks are authorized to appoint deputies, who are authorized to transact all official business appertaining to the office, to the same extent as their principals. A deputy must be at least 18 years of age." NRS 246.030(1).

Again, this language is identical to that utilized by the legislature with respect to the appointment of deputy district attorneys. Under the holding of the appellate court, all deputy county clerks could subject the municipality to liability under 42 U.S.C. § 1983.

Further, NRS 250.060, which pertains to county assessors, provides as follows: "All county assessors are authorized to appoint deputies, who are authorized to transact all official business appertaining to the offices, to

the same extent as the county assessors. A deputy must be at least 18 years of age." NRS 250.060(1)

Under the rationale of the appellate court, the language of NRS 250.060 would implicitly grant policymaking authority to deputy county assessors.

Finally, NRS 248.040, which pertains to county sheriffs, provides as follows: "Except as provided in NRS 248.045, each sheriff may: (a) Appoint, in writing signed by him, one or more deputies, who may perform all the duties devolving on the sheriff of the county."

Applying the reasoning of the appellate court, all deputy sheriffs in Nevada would also be final policymakers for their municipal employers.

In an attempt to minimize the consequences of its decision, the appellate court stated in a footnote:

> We are not persuaded that our holding will have the crushing effect that amicus urges. First, our holding does not address whether the principals who hold those other positions are final policymakers for municipalities. If a county recorder is not a final policymaker, then a deputy county recorder exercising coextensive authority is not a final policymaker.

Webb v. Sloan, 330 F.3d 1158, 1166 n. 5 (9th Cir. 2003). Though the Nevada Supreme Court has not held a county assessor, recorder, clerk, treasurer or sheriff to be a policymaker for the county, it is likely it could do so should the opportunity arise. For instance, in other jurisdictions assessors have been determined to be policymakers for establishing municipal liability.

In *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989), a female county employee working in the county assessor's office brought a retaliatory discharge suit against her male supervisor (the county assessor) and the county. *Id.* at 811. The court concluded that the county assessor had final policymaking authority to set employment policy as to the hiring of his staff, and that therefore the assessor's act was an act of the county. *Id.* at 818.

In *General Motors Corp. v. City of Linden*, 653 A.2d 568 (N.J. App. Div. 1995) (*rev'd on other grounds*), an owner of real property brought a civil rights action against a city and its tax assessor. *Id.* at 571. The court found that the city tax assessor's deprivation of constitutional rights in assessing property may be found to constitute the official policy of the municipality which appointed the assessor. *Id.* at 578. In finding that the assessor was a final policymaker, the court relied on NJSA 54:4-23. That statute confers plenary authority upon a tax assessor to "determine the full and fair value of each parcel of real property situate in the taxing district" and to "compute and determine the taxable value of such real property at the level established for the county pursuant to law." *Id.*

Similarly, in Nevada,

> the county assessor . . . shall ascertain by diligent inquiry and examination all real and secured personal property that is in his county on July 1 which is subject to taxation. . . . He shall then determine the taxable value of all such property, and he shall then list and assess it to the person, firm, corporation, association or company owning it on July 1 of that fiscal year.

NRS 361.260(1). With the same plenary authority granted to an assessor in Nevada, it would be likely that a Nevada court, following *General Motors Corp.*, *supra*, would also find a county assessor has final policymaking authority for the county. If this were so, according to the appellate court's decision in this case, the deputy county assessor would also be a policymaker with the ability to bind the municipality under 42 U.S.C. § 1983.

Similarly, as to each department mentioned above, the principals could arguably be called policymakers which would then in turn place policymaking authority with the deputies and saddle counties with liability for the deputies' action. The appellate court's decision essentially affirms such a result. However, this places the Ninth Circuit in conflict with other circuit courts.

B. Conflict in the Federal Circuit

The decision below creates a conflict with other federal circuit courts. For instance, in *Brown v. Neumann*, 188 F.3d 1289 (11th Cir. 1999), an arrestee brought a § 1983 action against a county for the actions of a deputy sheriff. *Id.* at 1290. The applicable statute in that case was Fla. Stat. § 30.07 which stated: "Sheriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible." *Id.* at 1291. The court, however, rejected the argument that the deputy sheriff was a final policymaking authority in Florida. *Id.* The court reasoned that "the only reasonable interpretation of the 'same power as the sheriff' language is that it does not put Deputy Sheriffs on a par with Sheriffs in terms of final

policymaking authority, and that the power referred to encompasses merely those powers which the Sheriff chooses actually to delegate." *Id.*

The decision of the Ninth Circuit in this matter places the Circuit in conflict with others which hold that the "same power" language in statutes does not create a policymaker out of deputies. *Id.*; *see also Anthony v. City of New York*, 339 F.3d 129 (2d Cir. 2003); *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998); *Taylor v. Monfils*, 165 F.3d 511 (7th Cir. 1998). And, in fact, the Ninth Circuit would create policymakers out of not only deputy district attorneys but also sheriffs, recorders, treasurers, assessors and clerks. The only possible manner in which to resolve this conflict among the circuits is to subject the Ninth Circuit's decision to review by this Court.

C. Conflict with Ninth Circuit States

The decision of the court of appeals also places the circuit at odds with various state court decisions within the circuit which have determined that their legislature has *not* given deputies policymaking authority. In showing the effect the appellate court's decision will have on other States within the Ninth Circuit, Petitioner, in its Petition for a Writ of Certiorari, cites Ariz. Rev. Stat. § 38-462. This statute states that deputy county officers in Arizona possess the *same powers* and duties as the principals. It is very interesting, then, that the Arizona Supreme Court in *City of Phoenix v. Yarnell*, 909 P.2d 377 (Ariz. 1995), did *not* find that all deputy district attorneys were, as a matter of law, final policymakers for the purpose of establishing municipal liability. *Id.* at 387-88. The Ninth Circuit's ruling with respect to deputies in Nevada, however, would

also affect the deputies in Arizona, making them policy-makers as well for purposes of § 1983 municipal liability.

Petitioner also cites Cal. Gov. Code, Title 3, § 24000, which states that "whenever the official name of any principal officer is used in any law confirming power or imposing duties or liabilities, it includes deputies." Thus, like Nevada, the power of a deputy is coextensive with the principal. However, the decision of the Ninth Circuit is directly in conflict with the decision of a California court which determined that the acts of deputies could *not* form the basis of liability for municipalities under § 1983. *See Bach v. County of Butte*, 147 Cal.App.3d 554, 195 Cal.Rptr. 268 (1983).

In *Bach*, the court recognized that local elected officials and appointed department heads could make policy which would subject their governmental employers to liability. *Id.* at 278. However, the court was loathe to extend this principle to deputies. *Id.*

> If the acts of municipal employees other than elected representatives or departmental supervisors are held to constitute official policy sufficient to impose federal Civil Rights Act liability on municipalities, then municipalities will be routinely liable for the tortious acts of their employees that violate Constitutional rights. Such a result would run counter to the teachings of *Monell* that there is no respondeat superior liability under section 1983.

Id. (citation omitted). The court further reasoned that, even though prosecutors have immunity from suit for prosecutorial decisions, subjecting the county to liability for the decisions of the deputy would "invite end runs around the prosecutorial immunity doctrine." *Id.* The court

acknowledged that prosecutors would be called to testify regarding prosecutorial decisions and would provoke a significant chilling effect on prosecutions. *Id.* Accordingly, the court found the deputy prosecutor's actions could not be said to represent official policy or custom sufficient to make the county liable under § 1983. *Id.*

The Ninth Circuit's ruling adversely impacts not only Nevada Deputy District Attorneys, but all official deputies in Nevada. Further, deputies in Arizona, California, and other Ninth Circuit States may now subject their municipal employers to liability by their conduct. Such a holding conflicts with decisions in other federal circuit courts as well as State court interpretations of the same issue. Accordingly, this Court should review the Ninth Circuit's decision in this matter and grant Petitioner's Petition for a Writ of Certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN C. BALKENBUSH
Counsel of Record
THORNDAL, DELK,
BALKENBUSH & EISINGER
6590 S. McCarran Blvd.,
Ste. B
Reno, Nevada 89509
(775) 786-2882
Counsel for Nevada Public Agency Insurance Pool

NOVEMBER 2003